ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

ORIGINAL FILE

RECEIVED

JUN 12 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	)	MM Docket No. 92-51

To: The Commission

COMMENTS OF MOTION PICTURE ASSOCIATION OF AMERICA

Norman P. Leventhal
Meredith S. Senter, Jr.
Lynn M. Crakes

Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 429-8970

Its Attorneys

June 12, 1992

No. of Copies rec'd 0+9

TABLE OF CONTENTS

	Page
SUMMARY	ii
I. Introduction	2
II. Elimination Of The Prohibition On Security Interests In Broadcast Licenses Would Impair The Functioning Of The Program Acquisition Marketplace.	4
A. Television Stations Rely On The Credit Extended By Program Suppliers.	4
B. Program Suppliers Examine The Overall Financial Condition Of A Station Licensee Before Extending It Credit.	5
C. A Station Licensee's Financial Condition Is A Significant Factor In Contract Negotiation.	7
D. The Prohibition Against Security Interests In FCC Licenses Is An Important Factor In A Program Supplier's Overall Credit Decision.	8
III. Under The Present System, Both Program Suppliers And Secured Creditors Are Willing To Work To Keep Stations On The Air.	9
A. Program Suppliers, Unlike Banks, Have An Incentive To Maintain A Competitive Television Station Marketplace.	9
B. The Prohibition On Security Interests Provides Program Suppliers With An Important Reason To Continue To Work With Stations In Financial Distress.	11
C. The FCC's Prohibition Against Security Interests Also Provides Secured Creditors With An Incentive To Help Stations Through Temporary Financial Distress.	13
IV. The Television Production Industry In General Would Suffer From A Change In The Law.	16
V. Conclusion	18

SUMMARY

MPAA submits that a change in the law on security interests in FCC broadcast licenses would drastically alter the landscape upon which the U.S. broadcast television industry has developed, to the detriment of the industry and the viewing public.

MPAA's members produce and supply a large portion of the programming broadcast by nearly every commercial television station in America. They therefore have a substantial financial interest in the economic health of commercial television broadcasting, and a unique incentive to work with stations to keep them on the air. Every station that goes dark is potentially one less customer.

Virtually all syndicated television programming is sold on credit by program suppliers to television stations. The credit extended by program suppliers is the only practical method by which television stations can obtain the bulk of their programming. Often, in fact, a station will owe more to its programming suppliers than to its secured creditors. In extending credit to television stations, program suppliers rely on the fact that, in the worst case where a station goes into bankruptcy, the value attributed to the station's FCC licenses will be available for pro rata distribution among the unsecured creditors.

If the Commission were to allow security interests in broadcast licenses, program suppliers, who have also been hard

hit by the economic recession, and who are not immune to financial difficulties, would be forced to tighten their credit policies, and would lose much of the incentive to work with financially troubled stations. In this connection, allowing security interests in broadcast licenses could force program suppliers to terminate programming agreements with stations immediately upon a default, leaving the station without high-quality programming and sending it down the road to bankruptcy. This would most adversely affect small and new television stations which, by their nature, are less financially stable.

Under current law, which prohibits the grant of security interests in FCC licenses, banks and other secured lenders recognize that a television station must stay on the air in order to recover on their loans. This reality provides secured lenders with a great incentive to continue to work with stations in temporary financial distress in order to keep them on the air. This incentive would be removed if lenders were allowed to take security interests in a station's FCC licenses, and banks would be more likely to initiate premature foreclosures, forcing financially distressed stations off the air. The public interest would clearly not be served by any change in the law that would lead to more stations going dark.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry	))))	MM Docket No. 92-51

To: The Commission

COMMENTS OF MOTION PICTURE ASSOCIATION OF AMERICA

Motion Picture Association of America ("MPAA"), by its attorneys, hereby responds to the Notice of Proposed Rule Making in the above-referenced proceeding ("NPRM"). MPAA is a not-for-profit corporation whose members are primarily engaged in the production and distribution of motion picture, television and home video entertainment programming.

In the NPRM, the Commission requests comment on, among other things, the statutory and policy implications of reversing its prohibition of third-party security interests in FCC broadcast licenses. In particular, MPAA responds herein to the Commission's request for comments on the following questions: (1) whether permitting the grant of security interests in broadcast licenses would disturb other financing arrangements, specifically whether program suppliers "would be less likely to extend credit to stations if their positions relative to the senior lender were subordinated;" and (2) "whether allowing security interests will discourage lenders from helping stations work past temporary financial difficulties." NPRM at ¶ 23.

As demonstrated below, the television programming industry -- especially the syndicated programming marketplace -- has developed against the backdrop of the Commission's prohibition on the grant of security interests in broadcast licenses. Any change in this policy will disrupt that marketplace, reduce the willingness of program suppliers to finance program sales, and discourage lenders from helping stations work past temporary financial difficulties.

I. Introduction

As the Commission recognizes in the NPRM, the broadcasting industry is "a cornerstone of American commerce" having substantial effects which radiate throughout the economy. NPRM at ¶ 2. The Commission itself cites as one example the fact that "the U.S. television broadcasting system has resulted in a vibrant television programming production industry," which has led to the development of a huge export market for television programs. As the Commission notes, "[i]n 1989, U.S. television production export totaled $1.696 billion, or roughly 71% of the world television production export." Id. (footnote omitted).

Notwithstanding that the industry operates today in a global marketplace and involves a number of distribution technologies, its core remains U.S. free over-the-air commercial television broadcasting. Commercial television broadcasting drives the industry -- when it is cut, the rest of the industry bleeds. No one, therefore, has a greater pecuniary interest in the health of commercial television broadcasting than MPAA's members, who produce and supply the bulk of the programming broadcast by virtually every commercial television station in America.

In its Comments on Hogan & Hartson's Petition for Declaratory Ruling Regarding Security Interests In FCC Licenses ("Hogan & Hartson Petition"), MPAA discussed at length the significance to program suppliers of the Commission's prohibition on the grant of security interests in broadcast licenses. MPAA incorporates those Comments by reference. Here, we attempt to address the factual question of how a change in the law might affect the television production and distribution marketplace.

One of the bedrock premises on which this industry has developed is the fact that broadcast station licensees may not grant a security interest in their FCC licenses. As shown below, enormous amounts of credit have been extended and re-extended on this premise. Any change in the law could affect not only the ability of individual television stations to acquire programming, but the ability of the industry as a whole to finance high-quality productions generally. Now is not the time to tamper with an American success story because of unrelated developments in the banking industry, largely brought on by unrestrained and undisciplined lending practices.

II. Elimination Of The Prohibition On Security Interests In Broadcast Licenses Would Impair The Functioning Of The Program Acquisition Marketplace.

A. Television Stations Rely On The Credit Extended By Program Suppliers.

In general, television stations obtain most of their syndicated programming pursuant to long-term contracts (generally four to six years in duration) under which payments are made over an extended period of time. Such programming contracts usually provide for a total license fee due and payable upon execution of the contract. As an accommodation to the television stations, however, most contracts provide that the license fee may be paid in installments. Through these long-term contracts, program suppliers extend substantial amounts of unsecured credit to television station licensees.

The financing provided by program suppliers is virtually the only source of financing for the acquisition of syndicated television programming. Stations are seldom able to pay the total license fee at the time of contract execution, and, in practice, other institutions (such as banks) simply do not extend credit for the purchase of programming. Therefore, with the exception of barter and network arrangements (which are important sources of programming, but which also deprive stations of significant commercial inventory and thus revenues), program-supplier financing is the only practical avenue for a station to obtain the bulk of its programming.

As a result of their willingness to extend credit to television stations, MPAA's members are among the largest unsecured creditors of commercial television stations. The industry estimates annual cash sales of syndicated television programming of at least $2 billion, most of which is outstanding at any one time. In today's competitive environment, few commercial television stations could exist without the financing provided by program suppliers for program acquisitions. Therefore, it is critical that the Commission carefully consider the impact that any change in its security interest policy would have on the television programming marketplace.

B. Program Suppliers Examine The Overall Financial Condition Of A Station Licensee Before Extending It Credit.

Like any prudent creditor, program suppliers are keenly interested in the financial condition of each station with which they contract. Before extending a station licensee credit through a programming contract, program suppliers carefully review the entire financial situation of the licensee. For example, program suppliers usually require new customers to submit extensive financial data, including balance sheets, income statements, and income projections for the next several years, as well as other financial documentation necessary to determine the financial viability of the station licensee. Program suppliers may also examine and rely upon the financial condition of the licensee's parent, in addition to that of the licensee.

In addition to the credit review at the time of contracting, program suppliers monitor a station's finances on a monthly basis. For example, one program supplier maintains a list of "problem stations" to which it will not license any additional programming. Any station on the list must meet certain financial requirements before the program supplier will sell it additional programming. In this connection, under the terms of its standard program license agreement, the program supplier has the right to request and receive the station's financial documentation at any time during the contract.

Program suppliers are thus vitally concerned with the overall financial condition of a station licensee, including the extent to which the licensee may be over-encumbered or excessively leveraged. In reviewing the licensee's financial documentation, program suppliers are aware that, in the worst case where a station ends up in bankruptcy, the value attributed to the FCC license will not be encumbered and will therefore be available for distribution among the unsecured creditors.

C. A Station Licensee's Financial Condition Is A Significant Factor In Contract Negotiation.

After thoroughly reviewing the financial background of a given station licensee, a program supplier may decide that the station is simply too heavily leveraged, or that it has too poor a payment history, for the program supplier to risk entering into a programming contract with that station. For example, because a program supplier knows that it will have a better chance of actually receiving payment from a less encumbered station, it may accept a lower bid from one of two stations in a market negotiating for exclusive rights to a particular program, where the higher bidder is significantly over-leveraged.

A station's poor financial condition may also cause a program supplier to limit the amount of programming it will sell the station in order to limit its exposure. Alternatively, program suppliers could demand personal or corporate guarantees from the licensee's shareholders or parent, require larger down payments, or even demand that the entire license fee be paid upon contract execution. As stated above, however, due to cash flow constraints, stations are seldom able to pay the entire license fee up front and, similarly, guarantees are often unavailable to program suppliers; thus, stations in this position may effectively be denied better programming.

D. The Prohibition Against Security Interests In FCC Licenses Is An Important Factor In A Program Supplier's Overall Credit Decision.

As explained above, program suppliers are well aware that broadcast station licensees today may not grant a security interest in their FCC licenses. This fact is a critical consideration in deciding whether to extend credit to a station; program suppliers rely on the fact that, in the worst case, the value attributed to the FCC licenses will not be encumbered and should be available to pay the debt owed to program suppliers, as well as to other unsecured creditors.

In other words, all credit decisions have been and continue to be made on the assumption that if a station licensee does fail and go into bankruptcy, the proceeds from the sale of the station that are attributed to the FCC license will be distributed on a *pro rata* basis to all creditors. Knowing that a security interest cannot be granted in broadcast licenses therefore allows program suppliers to extend credit for programming to smaller, less stable television stations. This alone contributes to the diversity of media voices in each community.

III. Under The Present System, Both Program Suppliers And Secured Creditors Are Willing To Work To Keep Stations On The Air.

A. Program Suppliers, Unlike Banks, Have An Incentive To Maintain A Competitive Television Station Marketplace.

Frequently, a station will owe more money to its program suppliers than to its secured creditors. But compared to banks and other secured lenders, program suppliers have a greater interest in a continued relationship with a station.

Unlike banks and other financial institutions, who jump from industry to industry depending upon which is believed to afford the highest return on investment at the moment, program suppliers are married for life to the television industry. They are locked in a symbiotic relationship with television station licensees, each needing the other to survive and prosper. Program suppliers thus have an incentive to work with stations under difficult circumstances, because they know that when a station goes off the air, program suppliers may lose a customer. Long after banks and other financial institutions have taken their last dime from television stations, or stopped lending to them, program suppliers will still be working with the industry, selling programming.

Because of this ongoing relationship, program suppliers have historically worked with stations in financial distress to restructure or refinance programming arrangements to devise payment plans that the stations can realistically afford and that will keep the stations on the air and out of bankruptcy through hard economic times. One of MPAA's members estimates that it is able to work out a new payment plan for financially troubled stations approximately eighty percent of the time.

In contrast, banks lend to many industries, and their loans to television stations are often a relatively small part of an individual bank's portfolio. In recent years, for example, large banking institutions have decided, without warning, to cease lending to broadcast stations, not because of lending difficulties with stations, but because of a change of interest by bank management. Banks want to collect their money first; whether the station survives to borrow another day is typically of secondary importance. Program suppliers, on the other hand, have a definite and ongoing financial interest in preserving a competitive television station marketplace. It is obvious, for example, that a program supplier will be able to command a higher price for programming in a market where two stations are competing, rather than just one.

Even if the current licensee is not able to keep the station operating, program suppliers have an interest in assisting a bankruptcy trustee or interim operator in keeping the station on the air until a buyer can be found. Program suppliers may then have the buyer as a customer. If the station goes off the air, it may be years before the station again resumes operation and is able to purchase programming.

B. The Prohibition On Security Interests Provides Program Suppliers With An Important Reason To Continue To Work With Stations In Financial Distress.

Because of the prohibition on security interests in FCC licenses, program suppliers have been willing to go to unusual lengths to work with stations in financial distress and to take measures that go beyond the natural predisposition of program suppliers to help stations stay on the air. In MPAA's Comments on the Hogan & Hartson Petition (at pp. 16-20), MPAA discussed how the prohibition on security interests had worked to keep station KGMC(TV), Oklahoma City, on the air, despite the efforts of the station's senior lender to take it dark. In that case, NCNB Texas National Bank, N.A. ("NCNB"), sought to force the sale of the station's assets to a competitor in the market, which, as the court noted, was also a customer of NCNB and which intended to remove KGMC(TV) from the air and return the FCC license to the FCC. In re Oklahoma City Broadcasting Company, 68 R.R.2d 94, 97 (Bankr. W.D. Okla. 1990). As MPAA noted in its Comments, however, owing in no small part to the bank's lack of a security interest in the FCC license for KGMC(TV), the station was instead ultimately sold to Ted Baze, a minority shareholder who had actually been responsible for the day-to-day operations of the station.

What MPAA did not point out in its initial Comments was that KGMC(TV) survived after the bankruptcy court's decision so deplored by the banks because program suppliers were willing to grant the station a 21-month hiatus on program payments. With the program suppliers' agreement to a hiatus on payments, NCNB also agreed to renegotiate its loan, and station KGMC(TV) ultimately expects to be able to pay the renegotiated bank loan in full. Had NCNB held a valid security interest in the FCC license, it probably would have forced a foreclosure sale to a competing television station, and, as a result, station KGMC(TV) would have been taken off the air. Instead, following negotiations among the parties, the station was ultimately sold to an experienced broadcaster, and service to the people of Oklahoma City was preserved.

In another television bankruptcy proceeding currently ongoing, program suppliers continue to make programming available to the station, notwithstanding that it currently owes approximately $12 million in programming debt (as compared to $4.5 million in secured debt). Indeed, the amount of the station's arrearages exceeds the amount of its total annual revenues. Nevertheless, program suppliers have continued to make programming available in order to preserve the station, but only with the knowledge that if all efforts fail, program suppliers will have a claim to any value attributed to the FCC license on an equal basis with other creditors.

In another case, a station in one of the top five markets in the country currently owes $24.5 million in programming debts and $15.1 in secured debt. Program suppliers have been willing to work with the station, which has thus far been able to avoid bankruptcy and continue offering an alternative voice in a major market, because of the lack of a security interest in the FCC license.

And, in yet another case -- the bankruptcy of the Media Central group of independent television stations -- the program suppliers were able to negotiate with the banks and to find buyers for the stations who ultimately satisfied the banks' claims. Once again, program suppliers worked with the stations to keep them on the air. The willingness of program suppliers to restructure the programming payments allowed time to find buyers for the stations. As a result, the stations are currently operating and contributing to the diversity of programming offered in their respective communities.

C. The FCC's Prohibition Against Security Interests Also Provides Secured Creditors With An Incentive To Help Stations Through Temporary Financial Distress.

As MPAA pointed out in its Comments on the Hogan & Hartson Petition (at p. 10), and as the National Association of

Broadcasters also observed (NAB Reply Comments at pp. 4-5), current law also encourages secured lenders to work with broadcasters in financial distress.

Without a security interest in a defaulting station's FCC licenses, banks can only foreclose on the hard assets of the station which, without the FCC license, are nearly worthless. Therefore, without such a security interest, banks realize that, in order to get the most money for that invested, the station must remain on the air, whether it is operated by a debtor-in-possession or sold to new owners as a going concern. Furthermore, banks recognize that the cooperation of the program suppliers is critical to keeping the station on the air. Without programming, the station simply has dead air. Banks are therefore forced to negotiate and work with both the debtor and program suppliers, to the ultimate benefit of the public.

If the FCC allows security interests to be taken in FCC licenses, the motivation of senior lenders would change significantly. Suddenly, it would be to the senior lenders' benefit to foreclose on the station's assets. Absent their current inability to foreclose on the FCC license, lenders have no reason to work to keep the station on the air. In this regard, the Comments of Norwest Bank Minnesota on the Hogan & Hartson Petition (filed January 3, 1992) are particularly illuminating. There, Norwest observes, quite candidly, that the prohibition on security interests in FCC licenses "results in business behavior that would not be found in other industries because unsecured creditors have more incentive to provide goods and services long after they would have cut other businesses off." Norwest Comments at 33. This would change, according to Norwest, if the FCC would only permit the grant of security interests in FCC licenses:

> [It] may change the relative bargaining position of some parties in Chapter 7 bankruptcy cases. The pool of money available to pay unsecured creditors may be decreased. Some program suppliers and other unsecured creditors will almost certainly lose more money. In future dealings with broadcasters, unsecured creditors will treat broadcasters like all their other clients and may cut off services sooner because there will be fewer assets available to pay them.

Norwest Comments at 34. MPAA wants to avoid sarcasm, but does Norwest seriously think that the picture it paints is better than the one that exists?

Program suppliers' credit decisions are currently made with the knowledge that, in the worst case where a station goes into bankruptcy, program suppliers will be able to share on a pro rata basis with other unsecured creditors in the value attributed to the FCC license. But, as Norwest admits, if a senior lender is permitted to take a security interest in all of the assets, including the FCC license, there may be little or no proceeds remaining for unsecured creditors after the sale of a station. Under these circumstances, program suppliers will justifiably be more reluctant to work with stations in financial distress than they currently are, and the public will bear the consequences of reduced programming service.

IV. The Television Production Industry In General Would Suffer From A Change In The Law.

The television production and distribution system is built, like many other industries, on credit. Television producers borrow money to make programs; television stations, in essence, borrow money to acquire them; and the efforts of the intervening players in the supply chain must be financed as well.

The current prohibition on security interests has served this industry well. As discussed above, it has enabled television stations to obtain credit to purchase high-quality programming that might otherwise be unavailable. This is particularly true of the more than 200 smaller suppliers who provide much of stations' programming diversity. In turn, program suppliers have been able to finance television productions based on the anticipated cash flows from program licensing agreements with individual stations. These productions have then generated a flourishing export market, adding to the nation's wealth.

Not only would a change in the law affect the ability of individual television stations to finance program acquisitions, it could also affect the ability of program suppliers to finance high-quality productions. As mentioned above, many program suppliers finance productions by pledging the anticipated cash flows from program licensing agreements. Any impairment in the creditworthiness of these license agreements adversely affects the ability of program suppliers to finance future productions. For example, if a television station falls behind on payments, the credit quality of the underlying program license agreement must be reevaluated, and, if it is necessary to "write it down," it reduces the program supplier's own ability to raise capital commensurately. Were the Commission to eliminate the prohibition on security interests in FCC licenses, obviously it would be necessary to revisit the creditworthiness of all unsecured loans to broadcasters, leading potentially to a significant impairment of program suppliers' own ability to raise capital to finance future productions.

In contrast, banks do not contend that a change in the law would result in more funds being made available to broadcasters. See MPAA's Comments on the Hogan & Hartson Petition at 8, nn. 6 & 7. Rather, the change would only increase the banks' "comfort" level. Id. at n.7.

Banking is not the only economically troubled industry in the country. The television syndication industry is also troubled, and small syndicators especially have suffered during the recession, with many being forced out of business. A change in the law on security interests in FCC licenses would only exacerbate program suppliers' economic problems. MPAA therefore cautions the Commission that it should tread lightly in this area, and not initiate a dramatic restructuring of the television production and distribution industry, just to make a few bankers more comfortable.

V. Conclusion

The public interest benefits of the Commission's prohibition on security interests in FCC broadcast licenses clearly demonstrate that reversing this policy is not justified. For over 50 years, banks and other financial institutions have funded the acquisitions of numerous broadcast stations, notwithstanding their inability to obtain a security interest in FCC licenses. During this same time, the prohibition has provided important incentive to unsecured creditors to provide goods and services to broadcast stations. In addition, the law has encouraged all creditors to work with broadcasters in financial distress and has thereby promoted continuity of service to the public.

In light of the foregoing policy considerations, MPAA respectfully submits that the FCC should reaffirm the prohibition of security interests in broadcast licenses.

Respectfully submitted,

MOTION PICTURE ASSOCIATION OF AMERICA

By: Norman P. Leventhal
Meredith S. Senter, Jr.
Lynn M. Crakes

Leventhal, Senter & Lerman
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006
(202) 429-8970

June 12, 1992

Its Attorneys